

90-306

Supreme Court, U.S.

FILED

AUG 13 1990

JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

IVAN STROH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
UNITED STATES**

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Attorney for Petitioner



QUESTIONS PRESENTED

1. Is reversible error committed by the trial court by admitting testimony as to the physical substance in question when the witness does not identify the substance with reasonable scientific certainty that it was the substance he examined?
2. Did the trial court err in failing to grant a mistrial due to the prosecutor's failure to supply information to Defendant in violation of Rule 16 of the Federal Rules of Criminal Procedure?

PARTIES IN THE COURT BELOW

The Petitioner, Ivan Stroh, was convicted in Count I of conspiracy to distribute a Schedule II controlled substance, Cocaine, in violation of Title 18, U.S.C., Section 371, and Section 841 (a)(1), and in Count II of a Schedule II controlled substance, Cocaine, in violation of 21 U.S.C. Section 841(a)(1). He was tried in the United States District Court for the Eastern District of Missouri.

The United States of America is the Respondent.

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The Petitioner, Ivan Stroh, respectfully prays that a Writ of Certiorari issue to review the judgment of United States Court of Appeals for the Eighth Circuit entered in this proceeding on April 30, 1990; and whose Petition for Rehearing was denied on June 26, 1990.

CITATIONS TO OPINION BELOW

The United States Court of Appeals issued its unpublished Five Sentence Opinion, and the order denying the Petition for Rehearing, which is set out in the Appendix at B, C, & D.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit denying Petitioner's Petition for Rehearing was entered on June 26, 1990.

This Petition for Certiorari is filed within Sixty (60) days of that date. Review is sought pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISION

Statutes and Regulations involved:

18 U.S.C. §371; 21 U.S.C. §841(a)(1)(2); Federal Rules of Evidence, Rule 702; Federal Rules of Evidence Rule 703; Federal Rules of Evidence, Rule 705; Federal Rules of Procedure, Rule 16(a)(1)(C). (Appendix A, p. 1)

STATEMENT OF THE CASE

The Petitioner, Ivan Stroh, was charged as an individual defendant in a two count indictment of conspiring to distribute Cocaine, a Schedule II controlled substance, in violation of Section 371, Title 18, United States Code, and Section 841(a)(1), Title 21, United States Code, Count II, Appendix E. The Government's case consisted of the testimony of police officers, witnesses granted immunity from prosecution, and a criminalist who testified as to the examination of a substance subsequently destroyed, but photographed and allegedly consisting of the only physical evidence examined by an expert witness as being cocaine obtained on July 20, 1987. The other alleged cocaine transactions set forth in the conspiracy count as to "what the substances were" was by the testimony of the immunized witnesses. There was never any controlled substance obtained and analyzed by any criminalist on the other dates set forth in the conspiracy. The date of the substantive count transaction was the same as set forth in Paragraph 6 of the Overt Acts of the conspiracy count, said date being July 20, 1987.

Petitioner denied any distribution or possession of any type of cocaine on July 20, 1987, or any other date.

At the close of the Government's case, as well as at the close of all the evidence, Petitioner moved for acquittal, which was denied.

The case involving Petitioner's objection for failure to identify with reasonable scientific certainty of the substance so testified to by the criminalist was as to photographs of the alleged substance, since the substance itself had been inadvertently destroyed by the Police Department.

Additionally, Petitioner contends that a mistrial should have been declared because of the Government's failure to comply with the District Court's order of failing to supply Petitioner's counsel with information pursuant to Rule 16 of the Federal Rules of Criminal Procedure.

Petitioner appealed his conviction of Seventeen (17) years confinement and a fine of \$10,000 to the United States Court of Appeals for the Eighth Circuit, where he alleged the foregoing as two of his assignments of error. These assignments were that the trial court committed reversible error by permitting the criminalist to testify since he did not have a reasonable degree of scientific certainty in that he did not sufficiently identify the substance he examined in violation of Federal Rules of Evidence 702, 703 and 705. The other assignment of error was the failure of the trial court to declare a mistrial because of the prosecutor's failure to supply information pursuant to Rule 16 of the Federal Rules of Criminal Procedure as to the disclosure of documents.

Petitioner's Petition for Rehearing before the panel of judges, as well as the court en banc was denied by the United States Court of Appeals for the Eighth Circuit.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS QUESTIONS CONCERNING THE ADMISSION OF TESTIMONY EVIDENCE AS TO THE SUBSTANCE ALLEGED TO BE COCAINE WHEN THE EXPERT CRIMINALIST WITNESS STATED HE COULD NOT TESTIFY WITH THE PROPER DEGREE OF SCIENTIFIC CERTAINTY AS TO THE SUBSTANCE INSPECTED, AND THE LACK OF THE CHAIN OF CUSTODY AS TO SAID POWDERED SUBSTANCE.

This case raises significant questions concerning the necessary identification and chain of custody required before the testimony of a witness could be admitted as to what the substance was, in particular, the controlled substance cocaine. The alleged cocaine was allegedly sold on July 20, 1987 to a St. Louis Police officer. It was the only physical evidence that was obtained by any witness and analyzed as cocaine by any expert witness in both counts as to the Petitioner/Defendant. If the cocaine allegedly seized on July 20, 1987 were not admitted in evidence, there could have been no submissible case as to Petitioner under Count II of the Indictment. Additionally, if this were not admitted, the Overt Act set forth in Count I would not have been proven. If the substance was not proven to be cocaine, the alleged transactions in the other Overt Acts would be totally incredulous, since all of the other Overt Acts in Paragraphs 1 through 5 of Count I were testified to by witnesses with prior convictions who were granted immunity for purposes of Petitioner's District Court Trial.

The criminalist testified he had taken the evidence from a locked evidence container in the front office of the laboratory, and opened the box in anticipation of running tests on the material. Another police officer took pictures of the container and, he, the criminalist saw such container and moved the exhibits in such a way to show initial on the bags containing the alleged controlled substance. The exhibit was identified by the

witness stating he believed it was the exhibit, but couldn't recall, and then stated he could not state with scientific certainty (Appendix Transcript Page 160), that it was a picture of the substance examined.

Rules 702 and 703 of the Federal Rules of Evidence would permit the criminalist to testify as long as the drugs identity is established beyond a reasonable doubt. *United States vs. Hunt*, 794 F.2d 1095 (5th Cir.); *United States v. Harrell*, 737 F.2d 971, 978. However, in the case before this Court for consideration no such identity was established, and the admission of the criminalist's testimony was in contravention of said Rules of Evidence.

II. THIS CASE PRESENTS QUESTIONS AS TO WHETHER A MISTRIAL SHOULD HAVE BEEN DECLARED DUE TO THE PROSECUTOR'S FAILURE TO SUPPLY INFORMATION TO DEFENDANT IN VIOLATION OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

This case raises significant questions concerning the necessity of strict compliance with Rule 16 of the Federal Rules of Criminal Procedure. Subsection C of said Rule, requires the granting of a continuance or entering an order the Court "deems just under the circumstances". Since the granting of a continuance would not be practical for the sake of justice because the trial had commenced, the ordering of a mistrial would be just under the circumstances. The Government's violation of the rule was during the course of the testimony of its seventh witness. The Police Report in question was changed after the Indictment of Petitioner by a witness of the Government who was a supervisor in the Narcotics Bureau. This report was changed some nineteen (19) months after the incident of July 20, 1987.

The Petitioner's attorney was not given the changes in the report, claimed surprise, and asked for a mistrial. (Appendix Vol. I 281), which was denied.

Petitioner submits that the material sought in the discovery process under the form of a tangible document was material to the preparation in his defense, and used by the Government for the refreshing of the recollection of the investigating supervisor police officer's testimony. There was no doubt in the Prosecutor's mind that the police report was a material document since the original police report filed was given Petitioner. The duty of the prosecution is continuing as set forth in Paragraph (c) of Rule 16, and Petitioner suggests that Petitioner should be charged for disclosure as under the Brady Rule for evidence favorable to the Defendant. *United States v. Agurs*, 427 U.S. 97, 110.

Petitioner urges that the Court impose upon the Government the continuing disclosure duty of furnishing the Defendant in a criminal case all documentary evidence it intends to use in its case in chief, and which is material as to the issues in the case.

CONCLUSION

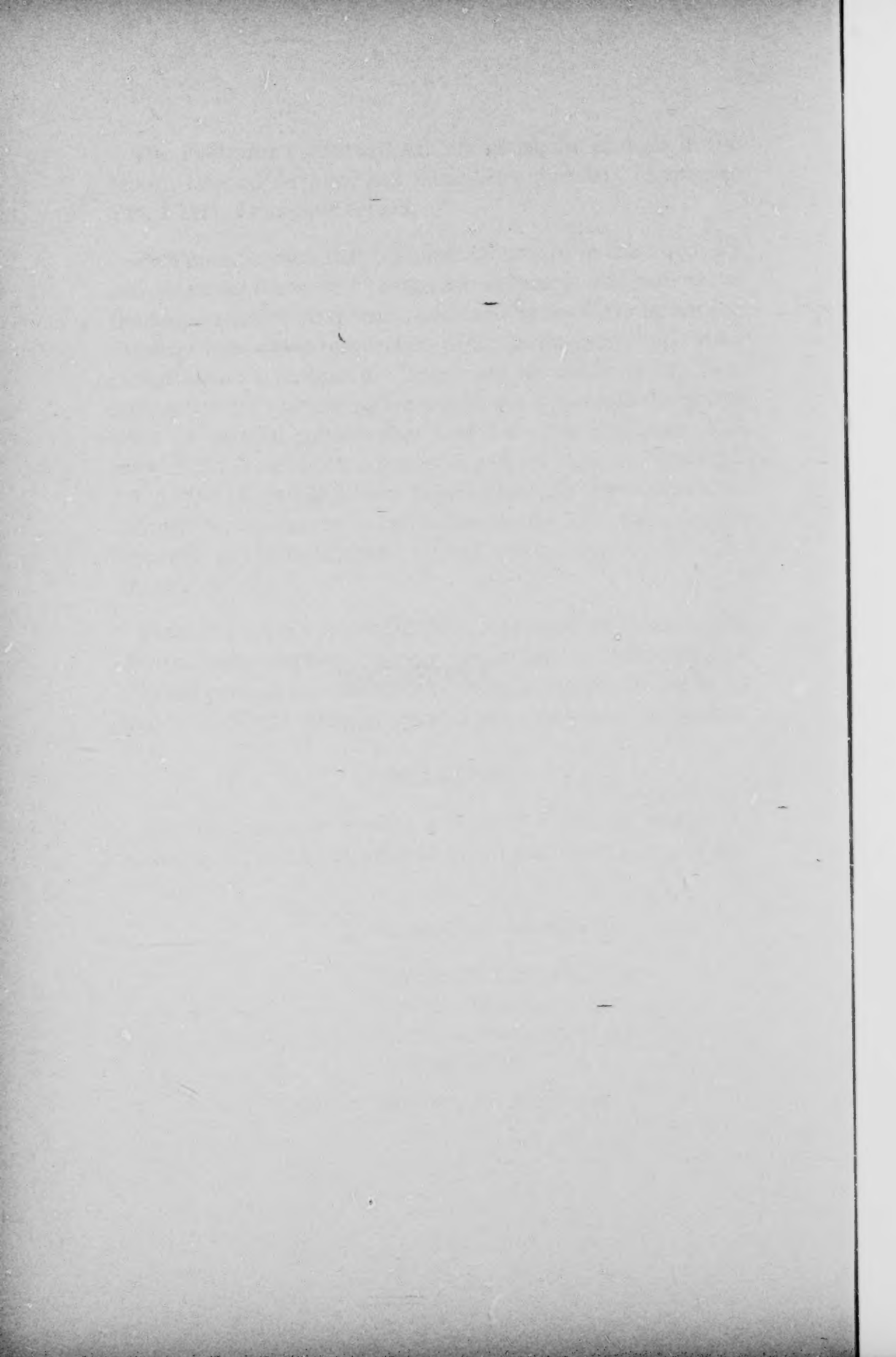
For the foregoing reasons a Writ of Certiorari should be issued to review the judgment of the United States Court of Appeals.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX



APPENDIX A

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 16. Discovery and Inspection

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

(C) Documents and Tangible Objects.

Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 89-2325

United States of America,
Appellee,

v.

Ivan Stroh,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

[UNPUBLISHED]

Submitted: April 12, 1990

Filed: April 30, 1990

Before ARNOLD, Circuit Judge, ROSS, Senior Circuit Judge,
and FAGG, Circuit Judge.

PER CURIAM.

Ivan Stroh appeals his drug related convictions.

Stroh contends the district court committed error in admitting the testimony of the government's expert witness, in refusing to grant a mistrial because of prosecutorial discovery viola-


tions, and in improperly restricting his cross-examination. Stroh also contends the evidence is insufficient to support the jury's verdict.

We have carefully considered Stroh's contentions and find them to be without merit. Stroh's convictions are affirmed.

A true copy.

Attest: /s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.



APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 89-2325EM

**United States of America,
Appellee,**

vs.

**Ivan Stroh,
Appellant.**

**Appeal from the United States District Court
for the Eastern District of Missouri**

(Filed June 26, 1990)

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

June 25, 1990

Order entered at the direction of the Court

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 89-2325EM

**United States of America,
Appellee,**

v.

**Ivan Stroh,
Appellant.**

**Appeal from the United States District Court
for the Eastern District of Missouri.**

JUDGMENT

(Filed July 26, 1990)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court is affirmed in accordance with the opinion of this Court.

April 30, 1990

A true copy.

Attest: /s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.

MANDATE ISSUED: 7/25/90

APPENDIX E

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

SUPPRESSED

No. 88-0332-CR(6)

**United States of America,
Plaintiff,**

vs.

**Ivan Stroh,
Defendant.**

COUNT I

The Grand Jury charges:

Beginning about January, 1986 and continuing up to September 1, 1988, in the Eastern District of Missouri the defendant,

IVAN STROH,

did conspire with Stanley Cook and others both known and unknown to the Grand Jury did willfully and knowingly combine, conspire, and agree amongst themselves and with each other to distribute cocaine, a schedule II controlled substance, in violation of Section 371, Title 18, United States Code, and Section 841(a)(1), Title 21, United States Code.

OVERT ACTS

In furtherance of said conspiracy, the defendant did the following overt acts:

1. On or about July, 1986, the defendant provided Stanley Cook with money and sent him to Clearwater, Florida to purchase approximately one kilogram of cocaine.

2. On or about late Summer and early Fall of 1986 and Winter of 1987, the defendant provided Stanley Cook with money and sent him to Kansas City, Missouri to purchase a kilogram of cocaine.

3. On or about March, 1987, the defendant provided Stanley Cook with money and sent him to Palmdale, California to purchase approximately one pound of cocaine.

4. On or about April, 1987 the defendant provided Stanley Cook with money and sent him to Palmdale, California to purchase approximately one pound of cocaine.

5. On or about May, 1987, the defendant provided Stanley Cook with money and sent him to Palmdale, California to purchase approximately one pound of cocaine.

6. On or about July 20, 1987, the defendant provided Stanley Cook with approximately one-half ($\frac{1}{2}$) ounce of cocaine which Cook sold to undercover police officer Emmitt Gelhot.

All in violation of Title 18, United States Code, Section 371 and Title 21, United States Code, Section 841(a)(1).

COUNT II

The Grand Jury further charges that:

On or about July 20, 1987, in the City of St. Louis, State of Missouri, in the Eastern District of Missouri, the defendant herein,

IVAN STROH,

did knowingly and intentionally distribute approximately one-half ($\frac{1}{2}$) ounce of cocaine, a schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL.

/s/ Donald Seay
Foreperson

THOMAS E. DITTMEIER
UNITED STATES ATTORNEY

/s/ Dean Hoag
Assistant United States Attorney

APPENDIX F

[Vol. 1 - 168]

Crowe - Cross

* * * *

Q. Okay. Would you have any independent recollection of what was on the face of those evidence envelopes that are turned down in Exhibits 10 and 10-A?

A. I —

Q. Can you tell us what was written on any of them of your own personal knowledge?

A. No, I cannot.

Q. That's because they're missing; is that fair?

A. That's — well, I don't have them to — to look at and I have no independent recollection.

Q. That's what I'm getting at. If you were here you could look at them and refresh your memory, though; is that fair?

A. Yes.

Q. And ordinarily you process, what, hundreds of documents and documents and materials in the lab in a year?

A. Yes.

Q. So the way you keep your thoughts together and you keep your memories in order is you initial things and you date [Vol. 1 - 169] them and as you said, you make sure you put a distinctive marking on them; is that fair?

A. Yes.

Q. Well, without having that distinctive marking all you can tell the jury is your beliefs; is that fair?

A. I —

Q. You don't have any documents with your distinctive marking; is that right?

A. That's correct.

Q. So all you can tell them is your belief, it appears to be the same, is that fair?

A. My memory as I can best remember is the best I can do.

Q. Okay. That is all we're asking for.

Could Wagner have been in the lab and taking pictures at another date to your knowledge?

After hours when you go home for instance,?

A. He could have.

Q. You know of one occasion when he took some pictures?

A. Yes.

Q. Okay. Not having seen the tags on any of those matters that he took pictures of before he took those pictures, you're not telling this jury with a degree of scientific accuracy that is the exact same documents or bags, are you?

Within a reasonable range of scientific certainty. Let's say that?

[Vol. 1 - 170] A. I'm trying to figure out your question.

Q. The question is real simple. Let me do it over. I've confused you and I apologize.

He took pictures of something at some point in time because you saw pictures taken, fair?

A. Yes.

Q. We've got some pictures there?

A. Yes.

Q. Okay. You didn't see the tags nor did you see the evidence envelope, the face of them, when the pictures are taken because obviously the envelopes are face down. That's true; is that right?

A. Yes, it is.

Q. You didn't recall seeing any initials on it at the time those photographs were taken; fair?

A. Yes.

Q. And my question to you is within a reasonable degree of scientific accuracy, you're a chemist, you're a criminalist, can you tell us those are the exact same documents, that's what I'm getting at, that the photographs depict?

A. No, I cannot.

* * * *

APPENDIX G [Vol 1. - 281]

Wagner - Cross

* * * *

MR. MARTIN: I've apprised the Court of the difficulties we've had in the discovery through no fault of Mr. Hoag's, but as of just 20 minutes ago when this man hit the stand I found for the very first time that in February 22, '89 they changed the reports. I was not given that, there's been no discovery on that, I had no idea about this, total surprise, and for that reason, Your Honor, violation of the trial court's order, I move for a mistrial on this.

THE COURT: Okay. Overruled.

* * * *